

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIAN KEITH SHARP,)	
)	
Petitioner,)	No. C 05-0583 CRB (PR)
)	
vs.)	ORDER DENYING PETITION
)	FOR A WRIT OF HABEAS
RICHARD KIRKLAND, Warden,)	CORPUS
)	
Respondent.)	
_____)	

Petitioner pleaded guilty to six counts of grand theft and one count of passing a check knowing there are insufficient funds in the Superior Court of the State of California in and for the County of Santa Clara. He also admitted that he had suffered a prior prison term. On September 22, 2003, he was sentenced to seven years and four months in state prison.

On February 7, 2004, petitioner filed a motion to amend the judgment claiming deprivation of various pre-sentence custody credits. The trial court denied the motion and, several months later, the California Court of Appeal affirmed the judgment of the trial court. On January 12, 2005, the Supreme Court of California denied review. The instant federal petition claiming unlawful deprivation of pre-sentence credits followed.

Per order filed on April 18, 2005, the court found that the petition appeared to state a cognizable claim under § 2254 and ordered respondent to show cause why a writ of habeas corpus should not be granted. Respondent filed an answer to the order to show cause. Petitioner did not file a traverse.

DISCUSSION

A. Standard of Review

This court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The writ may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.

"[A] federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state

1 court's application of clearly established federal law was "objectively
2 unreasonable." Id. at 409.

3 The only definitive source of clearly established federal law under 28
4 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the Supreme
5 Court as of the time of the state court decision. Id. at 412; Clark v. Murphy, 331
6 F.3d 1062, 1069 (9th Cir. 2003). While circuit law may be "persuasive
7 authority" for purposes of determining whether a state court decision is an
8 unreasonable application of Supreme Court precedent, only the Supreme Court's
9 holdings are binding on the state courts and only those holdings need be
10 "reasonably" applied. Id.

11 B. Claim & Analysis

12 Petitioner claims he was not given credit for time served in the county jail
13 prior to sentencing, as required by California law. He argues that he was arrested
14 on June 9, 2003 and sentenced on September 22, 2003, and therefore is entitled to
15 111 days custody credit plus good time/work time credits pursuant to California
16 Penal Code sections 2900.5 and 4019.

17 The California Court Appeal rejected petitioner's claim for lack of merit.
18 The court explained:

19 The probation officer's report indicates that Sharp had zero
20 days custody credit and zero days of good time/work credits.
21 During the sentencing hearing, defense counsel raised the issue of
22 credits and asked the court to consider awarding Sharp credits
23 dating from June 9. In sentencing Sharp, the court stated, "[c]redits
at this time are zero. And I'm not going to grant credits counsel in
this matter. He had mixed conduct and apparently was not doing
well on parole as evidenced by the statement from the parole
officer."

24 Subsequently, Sharp sent a document entitled "Ex-Parte
25 Motion to Amend Abstract of Judgment (AOJ) to Include Pre-
Sentence Credits per P.C. §§ 2900.5 & 4019" to Judge Wetenkamp.
26 Judge Wetenkamp denied the request stating, "[r]equest for
27 additional credits has been reviewed. Defendant was serving a
28 parole violation based on 'mixed conduct.' Therefore, defendant

1 was not entitled to credits toward the new sentences. [¶] Request
2 is denied."

3

4 Sharp asserts that because 41 days were added to his parole
5 period for absconding, he is being punished twice for the same
6 matter in that he is not getting any credit from the court. He argues
7 that the 41 days should be subtracted from his custody credits and
8 he should receive the remaining days plus any good time/work time
9 credits to which he is entitled.

10 In *People v. Bruner* (1995) 9 Cal.4th 1178, the court
11 explained that "where a period of presentence custody stems from
12 multiple, unrelated incidents of misconduct, such custody may not
13 be credited against a subsequent formal term of incarceration if the
14 prisoner has not shown that the conduct which underlies the term to
15 be credited was also a 'but for' cause of the earlier restraint.
16 Accordingly, when one seeks credit upon a criminal sentence for
17 presentence time already served and credited on a parole or
18 probation revocation term, he cannot prevail simply by
19 demonstrating that the misconduct which led to his conviction and
20 sentence was 'a' basis for the revocation matter as well." (*Id.* at pp.
21 1193-1194.) The court approved of decisions applying the general
22 rule "that a prisoner is not entitled to credit for presentence
23 confinement unless he shows that the conduct which led to his
24 conviction was the sole reason for his loss of liberty during the
25 presentence period. Thus, these cases reason, his criminal sentence
26 may not be credited with jail or prison time attributable to a parole
27 or probation revocation that was based *only in part* upon the same
28 criminal episode." (*Id.* at p. 1191; see *People v. Williams* (1992) 10
Cal.App.4th 827, 832, original italics [burden on defendant].)

Sharp admits that his parole was revoked in part because he
absconded. Thus, Sharp cannot satisfy his burden to show that the
conduct underlying his conviction was the sole – or "but for" –
reason for the disputed period of custody. (See, e.g., *In re Bustos*
(1992) 4 Cal.App.4th 851, 855 [no credit against sentence for
weapons violations, where custody also attributable to parole hold
based probation violation]; *In re Nickels* (1991) 231 Cal. App.3d
415 [no credit against sentence where custody also attributable to
hold for parole violation].) As a result, we do not find that the
court erred in denying him credit against his sentence for the
current offenses.

People v. Sharp, No. H027190, slip op. at 2-4 (Cal. Ct. App. Nov. 3, 2004)
(footnotes omitted) (Pet. Ex. A).

The California Court of Appeal's decision was not contrary to, or involved
an unreasonable application of, clearly established Supreme Court precedent, or

1 was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

2 In California, pre-sentence credits are awarded pursuant to Penal Code
3 section 2900.5.¹ The purpose of section 2900.5 is to endure that a person held in
4 pre-trial custody on the basis of unproven charges will not serve a longer overall
5 period of confinement upon conviction that a person who received an identical
6 sentence but was not held in custody before the conviction. See Bruner, 9 Cal.
7 4th at 1183-84. As the California Court of Appeal correctly observed, however, a
8 defendant cannot obtain credit for confinement prior to his conviction unless he
9 proves that but for the conduct which led to the sentence against which he seeks
10 credit, he would not have been subjected to pre-sentence custody. See id. at
11 1193-95.

12 The denial of pre-sentence credit under section 2900.5 may constitute
13 denial of a state-created liberty interest that is protected by the Due Process
14 Clause. It is clear, however, that California has not created a liberty interest in
15 credit for any period of pre-sentence custody for which a defendant cannot show
16 "that he could have been free" during the time period in question "but for the
17 same conduct that led to the instant conviction and sentence." Robinson v.
18 Marshall, 66 F.3d 249, 250 (9th Cir. 1995) (quoting Bruner, 9 Cal. 4th at 1195).²

21 ¹Pre-sentence credits under section 2900.5 also include work time/good
22 time credits earned pursuant to section 4019, i.e., one day of work performance
23 and one day of good behavior credit for every six days served for prisoners
24 confined in county or city jails, industrial farms or road camps. See People v.
Sage, 26 Cal. 3d 498, 502-03 (1980).

25 ²Limiting credit for time served on account of the offense or conduct
26 involved is not patently arbitrary. Nor is refusing to count time which is being
27 served on account of an entirely different offense. Neither section 2900.5, nor its
28 current application, violates due process or equal protection. See Robinson, 66
F.3d at 250-51.

